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11 Samsung Electronics America, Inc., and
Samsung Research America, Inc.

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

15 HUAWEI TECHNOLOGIES CO., LTD., et al.,

16 Plaintiffs,

17 v.

18 SAMSUNG ELECTRONICS CO., LTD., et al.,

19 Defendants.

20 _____
21 SAMSUNG ELECTRONICS CO., LTD. &
SAMSUNG ELECTRONICS AMERICA, INC.

22 Counterclaim-Plaintiffs,

23 v.

24 HUAWEI TECHNOLOGIES CO., LTD.,
HUAWEI DEVICE USA, INC., HUAWEI
TECHNOLOGIES USA, INC., & HISILICON
TECHNOLOGIES CO., LTD.

25 Counterclaim-Defendants.
26 _____
27
28

CASE NO. 16-cv-02787-WHO

**SAMSUNG'S OPPOSITION TO
HUAWEI'S MOTION TO
PRECLUDE SAMSUNG'S FRAND
EXPERTS FROM OFFERING
IMPROPER LEGAL OPINIONS**

Hearing Date: August 8, 2018

Time: 2:00 p.m.

Judge: Hon. William H. Orrick

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24	
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1 **I. INTRODUCTION**

2 Huawei’s motion to preclude certain “legal opinions” from the expert reports of Michael
 3 A.M. Davies and Jerry A. Hausman should be denied. Several of the challenged paragraphs simply
 4 provide standard disclosures of the legal framework within which each expert renders his opinions.
 5 The remaining challenged paragraphs fall well within each expert’s undisputed areas of subject
 6 matter expertise. Where each expert uses any legal terminology, it is only to explain the legal
 7 framework for his opinions or to convey expert analysis well within his field of expertise. *Fidelity*
 8 *Nat. Financial, Inc. v. Nat. Union Fire Ins. Co. of Pittsburg, PA*, 2014 WL 1286392, at *9 (S.D.
 9 Cal. March 28, 2014) (“The Ninth Circuit allows an expert to refer to the applicable laws and
 10 regulations that inform his opinion.”).

11 For Mr. Davies, most of the challenged statements consist of undisputed facts regarding
 12 standard essential patents (“SEPs”) that provide context and background to his assignment in this
 13 case: opining on technical alternatives to Huawei’s purported SEPs at the time of the adoption of
 14 the 4G standard in order to support Samsung’s antitrust case. These statements are well-grounded
 15 in Mr. Davies’ experience as a Senior Lecturer at Massachusetts Institute of Technology (“MIT”),
 16 as a patent holder, and as a frequent participant in industry standard setting. Similarly, all of the
 17 challenged statements in Prof. Hausman’s report reflect his economic analysis of Huawei’s
 18 anticompetitive behavior grounded in his unquestioned experience as a Professor of Economics at
 19 MIT with a research focus on Industrial Competition. The fact that Prof. Hausman at times uses
 20 legal terminology to proffer his economic analysis does not impeach that analysis, but rather places
 21 it squarely in the proper context to explain Huawei’s antitrust violation. Huawei’s motion should
 22 be denied.

23 **II. HUAWEI’S CASE LAW IS INAPPOSITE**

24 It is standard practice for experts to conduct their analyses and provide opinions within the
 25 parameters of a legal framework. *Advanced Thermal Scis. Corp v. Applied Materials Inc.*, 2009
 26 WL 10673194, at *1 (C.D. Cal. Oct. 28, 2009) (“The analysis of complex facts, albeit within a legal
 27 framework, is a proper role for an expert.”); *see also Altera Corp. v. PACT XPP Techs., AG*, 2015
 28 WL 4999952, at *1 n.1 (N.D. Cal. Aug. 21, 2015) (limiting future expert testimony “to proper

1 subjects for expert opinion and any facts or legal understandings necessary to form those opinions").
 2 While it is true that an expert cannot invade the province of the court to instruct on the law, an expert
 3 may offer his opinions within the legal terminology of the legal framework pertinent to his opinions.
 4 *Fidelity*, 2014 WL 1286392, at *8-9 (allowing expert to "couch[] his opinion in legal terms" and
 5 "'refer to the law in expressing his opinion' so as to assist the jury understand the facts.").

6 The cases cited in Huawei's motion are inapposite as they involve experts usurping the
 7 Court's role by rendering opinions on legal questions. For example, in *Crow Tribe of Indians v.*
 8 *Racicot* (Mot. at 2-4), the challenged testimony was an expert's interpretation of the term "lottery
 9 games" in the contract at issue. 87 F.3d 1039, 1044-45 (9th Cir. 1996). The Court held that such
 10 expert testimony was impermissible because "interpretation of a contract is an issue of law" and
 11 "[e]xpert testimony is not proper for issues of law." *Id.* at 1045. Similarly, in *Pokorny v. Quixtar*
 12 *Inc.*, (Mot. at 2), the Court excluded the expert's challenged testimony because he opined that the
 13 contract at issue was "unconscionable," which was "the exact legal question that the Court itself
 14 w[ould] decide." 2007 WL 1932922, at *2-3 (N.D. Cal. June 29, 2007).

15 Here, neither Mr. Davies nor Prof. Hausman interpret contractual provisions, nor do they
 16 usurp the role of the Court in instructing on pure legal matters. Mr. Davies and Prof. Hausman do,
 17 in certain parts of their challenged testimony, reference the pertinent legal framework, but only in
 18 service of providing opinions on electrical engineering and economics, their respective areas of
 19 expertise. Indeed, Huawei cites authority, *Villalpando v. Exel Direct Inc.*, (Mot. at 2-3), that makes
 20 clear that experts may base their factual analysis on legal assumptions. 161 F. Supp. 3d 873, 895
 21 (N.D. Cal. 2016) (allowing expert testimony "to the extent that [expert] may offer factual testimony
 22 that is **based on legal assumptions**") (emphasis added). Samsung's experts merely disclose these
 23 legal assumptions in their reports, and additionally give opinions that rest on the legal assumptions
 24 they have adopted.

25 **III. THE CHALLENGED PARAGRAPHS OF MR. DAVIES' EXPERT REPORT DO
 26 NOT SET FORTH IMPROPER LEGAL OPINIONS**

27 Mr. Davies is a Senior Lecturer at MIT, where he teaches the business and engineering
 28 portions of the Integrated Design and Management Program. He has served as an expert in over

1 eighteen cases, including as an industry expert for the Department of Justice in 2011 in the antitrust
 2 investigation of the proposed AT&T and T-Mobile merger. Ex. 1, ¶¶ 11-12, Ex. 1.

3 Huawei argues that paragraphs 21 through 27 of Mr. Davies' report offer objectionable
 4 "legal opinions concerning the conditions under pursuit of injunctive relief in connection with
 5 infringement of a standard essential patents may violate the antitrust laws at trial." Mot. at 2. A
 6 simple inspection of these paragraphs reveals that only paragraph 27 includes *any* discussion of
 7 these "conditions":

<u>Report Paragraph</u>	<u>Subject Matter</u>
<p>9 21. <i>I have been asked to</i> examine several 10 patents and to determine whether or not there 11 were technically feasible alternatives that 12 could have been chosen as the basis for the 13 relevant standard. <i>I have reviewed</i> each of 14 these patents, identified the key mechanisms 15 of concern, and <i>I have considered</i> whether a 16 person of ordinary skill in the art could have 17 readily identified alternative approaches that 18 met the same requirements. <i>I have also looked</i> 19 <i>at</i> other relevant prior art from the related 20 fields, in particular wireless communications, 21 with which a person of ordinary skill would 22 have been familiar, and wherein when 23 confronted with analogous problems 24 alternative approaches have been 25 implemented. <i>I have reviewed</i>, where 26 available, LTE patents describing alternative</p>	Summary of assignment and materials reviewed. No legal opinions.

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1 approaches that were proposed by other parties 2 for the LTE standard.	
3 22. Organizations within an industry may 4 cooperate to create a standard. As part of 5 participating in the standards-making 6 process, each of these organizations makes a 7 commitment that any patents which are 8 essential to the standard, so called standard 9 essential patents (SEPs), shall be licensed to 10 other entities on a fair, reasonable, and non- 11 discriminatory (FRAND) basis.	High-level description of standard-setting process and SEPs. Huawei does not object to the correctness of any of the content.
12 23. As these organizations work on 13 developing and implementing the standard, 14 any individual member organization of the 15 standards body may file patents. If a member 16 believes, and wishes to assert, that the 17 invention(s) described in one of their patents 18 must be used in order to properly implement 19 the standard, it declares the patent to be 20 standard essential with respect to that 21 particular standard. The standards body keeps 22 a record of every patent that is declared by 23 each of its constituent members to be 24 standard essential.	High-level description of standard-setting process and SEPs. Huawei does not object to the correctness of any of the content.
25 24. There are several reasons why a patent 26 that is declared to be standard essential may 27 be found to be non-essential. For instance, it	High-level description of why a patent that is declared to be standard essential may be found

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1 may be found upon thorough review that a 2 patent which has been declared an SEP is only 3 applicable to some implementations or 4 embodiments of the standard. <i>For example</i> , if 5 one of a company's patents deals with TDD 6 mode, but TDD mode is only one of a plurality 7 of possible implementation options within the 8 standard, the patent would be found to be non- 9 essential due to the fact that the standard may 10 be successfully implemented without using the 11 patent at all (e.g. perhaps the standard also 12 supports FDD mode).	to be non-essential. Huawei does not object to the correctness of any of the content.
13 25. Generally, the value that a company is 14 entitled to recover for an SEP is equal to the 15 value that the patent held prior to it becoming 16 incorporated into the standard. The reason for 17 this is simple. <i>It is generally understood that 18 in many cases there are a number of feasible 19 alternative ways of satisfying the 20 requirements of the standard.</i> Each of these 21 alternatives has the same value prior to the 22 selection of one to be adopted into the 23 standard. <i>Once the selected patent has been 24 incorporated into the standard, anyone using 25 the patent in implementing the standard must 26 pay royalties for it on a Fair, Reasonable, 27 and Non-Discriminatory (“FRAND”) basis.</i>	High-level description of the value that a company is entitled to recover for an SEP, and the reason why. Huawei does not object to the correctness of any of the content.

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1 2 3 4	At this point, the value of that particular patent is much higher than the value of the patents or inventions that were not selected for adoption into the standard.	
5 6 7 8 9 10 11 12 13 14 15 16 17 18	26. <i>A key difference arises when there is objectively only one feasible way of satisfying the requirements of the standard.</i> In this case, the patent would be called “fundamental,” as there are no acceptable alternative implementations. <i>For example</i> , the only way to meet the design requirements for LTE with low latency, high bandwidth, and high coding efficiency is to use orthogonal frequency-division multiplexing (OFDM). <i>Other schemes</i> like code-division multiple access (CDMA) cannot be used, for reasons including some issues related to mobility management.	High-level description of what occurs when there is only one feasible way of satisfying the FRAND requirements. Huawei does not object to the correctness of any of the content.

19 These challenged statements thus set forth Mr. Davies’ understanding of the legal framework
 20 for standard essential patents, as well as basic technical opinions about SEPs that fall well within
 21 Mr. Davies’ expertise and experience as a frequent participant in standard setting activities; as a
 22 patent holder in the field of wireless telecommunications; as a Senior Lecturer at MIT in Electrical
 23 Engineering; and as a significant leader in the telecommunications industry (including as New
 24 Zealand’s representative to the standard-setting organization International Telecommunication
 25 Union Radiocommunication Sector). Ex. 1, ¶ 14, Ex. 1; Ex. 2, at 39:11-40:2. Critically, Huawei
 26 does not attack the correctness or accuracy of *any* of these statements. Moreover, Huawei’s counsel
 27 had the opportunity to explore where exactly Mr. Davies learned these legal principles at his
 28 deposition, but chose to limit his inquiry to whether Mr. Davies learned these principles from

1 Samsung's counsel. Huawei's motion as it pertains to paragraph 21-26 of Mr. Davies's report
 2 should therefore be denied.

3 That leaves paragraph 27. As discussed above, Mr. Davies has extensive experience in
 4 standard-setting, and is familiar with the rationales and principles underlying commitments made to
 5 the standard-setting body. Moreover, as permitted by courts, Mr. Davies is permitted to summarize
 6 his understanding of a general legal framework in which to apply "complex facts." *Advanced*
 7 *Thermal Scis.*, 2009 WL 10673194, at *1. Because Mr. Davies provides technical opinions
 8 supporting Samsung's antitrust case, it is entirely proper for Mr. Davies to summarize his
 9 understanding of this general legal framework in his report. *See* Ex. 1, ¶ 27 ("A holder should not
 10 be granted an injunction on a patent ex-post if the patent was only one of a number of equally
 11 plausible alternatives ex-ante"); *Fidelity*, 2014 WL 1286392, at *9. Huawei's motion should
 12 therefore be denied as to paragraph 27 as well.

13 **IV. THE CHALLENGED PARAGRAPHS OF PROF. HAUSMAN'S EXPERT
 14 REPORTS SET FORTH PROPER ECONOMIC EXPERT ANALYSIS**

15 Huawei's motion to preclude paragraphs 32 and 56-58 from Prof. Hausman's opening
 16 rebuttal report, and paragraph 14 from his rebuttal report, should be denied because they properly
 17 set forth *economic* opinions grounded in Prof. Hausman's unquestioned expertise in economics and
 18 industrial competition. *See, e.g., U.S. Info. Sys., Inc. v. Int'l Bhd. of Elec. Workers Local Union No.*
 19 *3, AFL-CIO*, 313 F. Supp. 2d 213, 240-41 (S.D.N.Y. 2004) (permitting expert economist to "point
 20 to factors that would tend to show anticompetitive conduct in a market...indicate whether he
 21 believed those factors existed here, and what the economic significance of those factors would
 22 be...[and] also explain how certain conduct could affect a market through the use of hypothetical
 23 statements."). Prof. Hausman's qualifications in the fields of economics and antitrust are
 24 unimpeachable. Prof. Hausman is the MacDonald Professor of Economics at MIT, and has been at
 25 MIT ever since he completed his D. Phil (Ph.D.) in economics from Oxford University in 1973
 26 where he was a Marshall Scholar. Ex. 3, ¶ 1. Prof. Hausman has received the John Bates Clark
 27 Award of the American Economic Association, awarded every other year for the most "significant
 28 contributions to economics" by an economist under the age of 40, the Frisch Medal of the

1 Econometric Society, and has published over 170 academic research papers in leading economic
 2 journals. *Id.* ¶ 2. Prof. Hausman has testified as an expert witness in numerous antitrust
 3 proceedings, and has lectured on various antitrust issues to members of the Department of Justice,
 4 the Federal Trade Commission, amongst other international bodies. *Id.* ¶ 3. Prof. Hausman also
 5 has substantial experience in high-technology industries, and has conducted extensive academic
 6 research in the mobile telecommunications industry. *Id.* ¶¶ 4-6.

7 Prof. Hausman draws from his wealth of antitrust and economic expertise in proffering the
 8 opinions within the paragraphs of his reports that Huawei now challenges. These opinions are well-
 9 grounded in economic analysis of the competitive dynamics of the wireless industry. To the extent
 10 Prof. Hausman utilizes legal terminology, such opinions remain proper expert testimony because
 11 Prof. Hausman uses such terms only to provide a legal framework for which to apply complex facts
 12 as necessary to assist the jury understand such facts. *Advanced Thermal Scis.*, 2009 WL 10673194,
 13 at *1; *Fidelity*, 2014 WL 1286392, at *9.

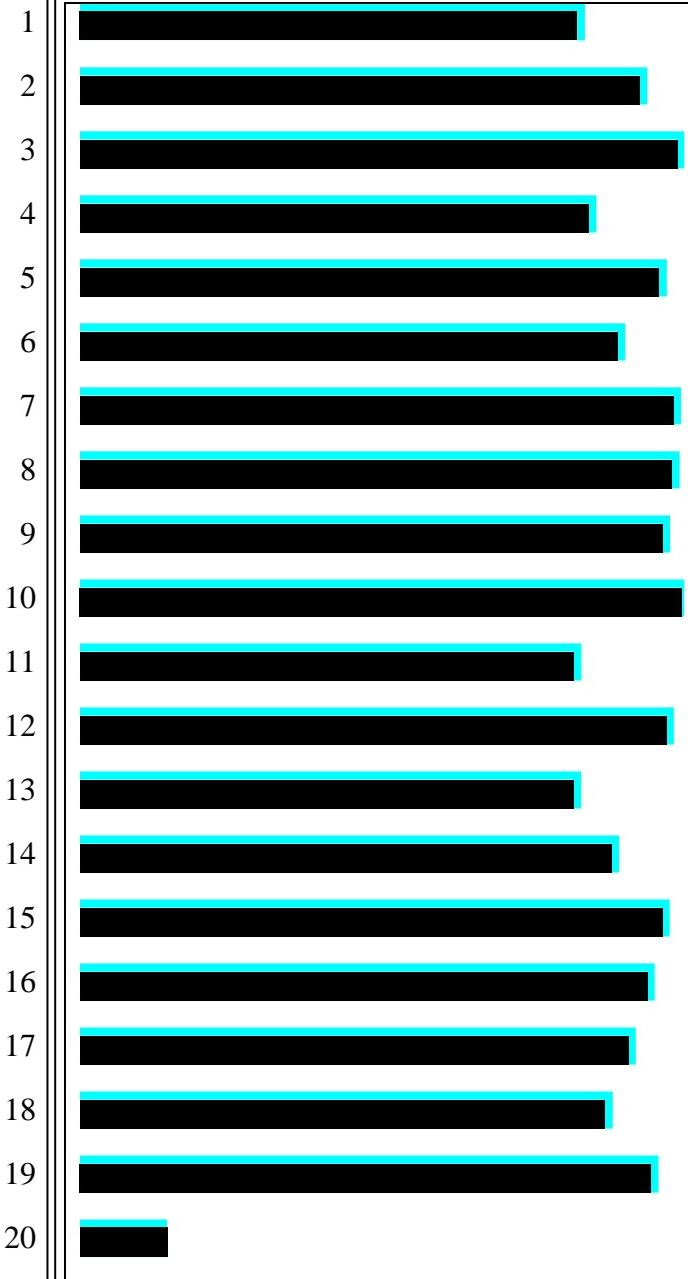
<u>Report Paragraph</u>	<u>Subject Matter</u>
15 [REDACTED]	Economic analysis of anticompetitive
16 [REDACTED]	behavior, and potential impact on economic
17 [REDACTED]	welfare of society.
18 [REDACTED]	
19 [REDACTED]	
20 [REDACTED]	
21 [REDACTED]	
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22 The bolded statements above are not legal in nature, but rather are grounded in and
23 demonstrate Prof. Hausman's economic analysis of anticompetitive concerns arising from Huawei's
24 behavior. *Fleischman v. Albany Med. Ctr.*, 728 F. Supp. 2d 130, 166 (N.D.N.Y. 2010) (allowing
25 expert economist to "interpret[] the likelihood of a [legal issue] based on certain well accepted
26 economic factors" as his "opinions are informed by his background knowledge in economics and
27 his ability to apply the facts to this information."); *see also Hangarter v. Provident Life and Acc.*
28 *Ins. Co.*, 373 F.3d 998, 1016-17 (9th Cir. 2004) ("A[n] [expert] witness may refer to the law in

1 expressing an opinion without that reference rendering the testimony inadmissible.”). Thus, while
 2 Huawei takes issue with the legal framework *underlying* Prof. Hausman’s competitive analysis of
 3 injunctions—as demonstrated by its motion for summary judgment on Samsung’s antitrust claim—
 4 Huawei ignores that Prof. Hausman’s analysis itself is not legal. *See* Ex. 3, ¶¶ 56-58. Taken
 5 literally, Huawei’s argument to exclude this analysis would mean that expert economists could
 6 *never* opine as to the economic effects of an injunction. This cannot be.

7 Other courts have routinely affirmed the reliability of Prof. Hausman’s economic opinions
 8 referencing pertinent legal principles, and have denied Daubert motions similar to Huawei’s motion.
 9 *See, e.g., Int’l Bus. Machines Corp. v. Priceline Grp. Inc.*, 271 F. Supp. 3d 667, 692 (D. Del. 2017)
 10 (denying motion to exclude Prof. Hausman’s testimony where Prof. Hausman provided economic
 11 analysis couched within terminology of a patent damages legal framework); *see also Jaffe v.*
 12 *Samsung Elecs. Co.*, 737 F.3d 14, 22 (4th Cir. 2013) (crediting Prof. Hausman’s testimony that
 13 “failure to apply Section 365(n) [of the U.S. Code] would reduce investment, innovation, and
 14 competition, which would harm U.S. productivity growth and U.S. consumers as well as worldwide
 15 productivity and consumers.”); *Purdue Pharma L.P. v. Boehringer Ingelheim GmbH*, 98 F. Supp.
 16 2d 362, 398 (S.D.N.Y. 2000) (crediting Prof. Hausman’s testimony where Prof. Hausman testified
 17 as to the anticompetitive effects that would occur if a preliminary injunction did not issue).

18 Underscoring the unreasonableness of its position, Huawei seeks to exclude opinions █
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 20 █
 21 █
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 23 █

24 █ To the extent the Court grants Huawei’s motion pertaining to Prof. Hausman, the Court should
 25 similarly preclude Huawei’s experts from proffering similar testimony.

26 Huawei concludes its motion by rearguing its contemporaneously filed motion for summary
 27 judgment. It again disagrees with Prof. Hausman that Huawei’s SEP abuses violated U.S. antitrust
 28 laws, including under the “act of state” doctrine. *See* Dkt. 327-8. For the same reasons set forth in

Samsung's opposition to Huawei's summary judgment motion concurrently filed herewith, Huawei's arguments are meritless.

V. CONCLUSION

For the foregoing reasons, Huawei's motion should be denied.

DATED: July 17, 2018

Respectfully submitted,

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